Supreme Court, U.S.
FILED

No. _____

021508 APR 14 2003

In The

Supreme Court of the United States

LENORA MCNEIL,

Petitioner,

v.

SCOTLAND COUNTY,
a body politic and incorporated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James H. Locus, Jr.
Counsel of Record
ATTORNEY AT LAW
Post Office Box 331
Fayetteville, North Carolina 28302
(910) 630-1491

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ One Massachusetts Ave., NW ♦ Suite 670 ♦ Washington, DC 20001
(202) 789-2400 ♦ Fax: (202) 789-1911 ♦ www.thelexgroupdc.com

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QUESTIONS PRESENTED

1. WHETHER MORE OBJECTIVE PERIMETERS SHOULD BE EMPLOYED BY THE DISTRICT COURT IN ANALYZING WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS WHEN A NON-MOVANT TITLE VII PLAINTIFF PRESENTS EVIDENCE OF PRETEXT WHILE OPPOSING A SUMMARY JUDGMENT MOTION?

CORPORATE DISCLOSURE

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Lenora McNeil petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, 53 Fed. Appx. 242; 2002 US App. Lexis 26140 (4th Cir. 12/18/02), is set forth in the Appendix hereto (App., infra, 1a). The Memorandum of Decision of the District Court for the Eastern District of North Carolina is unpublished and set forth in the Appendix hereto (App., infra, 5a).

JURISDICTION

The final judgment of the United States of Appeals for the Fourth Circuit affirming the decision of the District Court of the Middle District of North Carolina was entered on December 18, 2002. (App., infra, 1a). The Order of that court denying Petitioner's request for rehearing and suggestion for rehearing en banc was entered on January 27, 2003. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c). The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedures, Rule 56(c)

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE FACTS

The petitioner, Ms. Lenora McNeil, an African American, was hired as a Clerk Assistant III in the Medicaid Unit of the Department of Social Services for Scotland County (hereinafter referred to as "DSS") in 1995. She was subsequently promoted to an Intake Maintenance Technician, but after she filed her first EEOC charge in November 12, 1998, she was demoted back to the clerk position she originally held when she was first employed with DSS. The evidence showed that after this EEOC charge, the campaign began by DSS to show that Ms. McNeil was suddenly not qualified as a case worker, that she was performing her work inefficiently and that she was not a team player. The District Court did not even mention this critical evidence of retaliation which commenced the non-stop efforts by DSS to discredit Ms. McNeil's work.

She was also relocated from her office and for a period of time, she had no duties or responsibilities given to her. When her duties were restored, she was given new duties that she was unfamiliar with and she was not provided any formal training in order to perform these new duties. The District Court drew an inference that DSS provided Ms. McNeil with a schedule of daily job functions to improve her work performance was in direct contradiction with Ms. McNeil's evidence that during this same exact period of time her duties had been stripped from

her and she in fact was not being assigned any duties. The evidence by Ms. McNeil showed that even after her immediate supervisor was promoted, he remained in her chain of command and continued to make final decisions about her work environment.

DSS claimed that she was issued assignments in this fashion because she was inefficient in performing her duties. Ms. McNeil rebutted this contention from DSS with evidence that the denial of a permanent job description was a retaliatory tactic designed to make it appear that she was not adequately performing her work when she in fact was.

The requirement that Ms. McNeil report to work on a daily basis without prior knowledge of what work she would be assigned made it impractical for her to plan any assignments. DSS supervisors used this ploy to make it appear that Ms. McNeil was inefficient in her work. These claims by DSS supervisors that Ms. McNeil was given daily tasks to improve her efficiency were rebutted by clear evidence from Ms McNeil that without a permanent position description this was how she was routinely assigned duties as part of the retaliatory harassment directed toward her.

From the time that Ms. McNeil began working at DSS until she departed, she never received a permanent position description She found difficulties in maintaining continuity in the performance of her duties because DSS supervisors were changing her work requirements on a daily basis. While she was provided a generic position description that one was fluent and frequently changed. By not giving Ms. McNeil a permanent position description, DSS was free to assign her any type of duties that included case worker assignments. On a day to day basis, she did not know what her work assignments would be, who she would

be working for or how long she would have to complete an assignment.

Although the issue of Ms. McNeil not having a permanent position description was an issue before she filed her first EEOC charge, there was no evidence offered in the record that the quality of her work was an issue until after she filed her EEOC charges. Prior to the EEOC charge, Ms. McNeil was given a written warning because she made comments about not receiving a permanent position description, but this warning was not in regard to her work performance. Her supervisor simply documented his apparent frustrations (and her frustrations) about Ms. McNeil not receiving a permanent position description. There was no evidence in the record that prior to Ms. McNeil's first EEOC charge that she was ever guilty of misconduct or malfeasance of her duties.

Although Ms. McNeil was never given a permanent position description as a technician and was denied several positions as a case worker, she was required to perform many duties normally assigned to experienced case workers. One case worker, Ms. McDuffie testified that Ms. McNeil was doing the same type caseworker duties as the other case workers. Ms. McNeil performed these duties without the benefit of any training. Although she performed her case worker duties without adequate training, it was uncontroverted that she made very few errors. Evidence in the record proved that each time Ms. McNeil applied for a promotion as a case worker, her case worker duties were unjustly scrutinized by supervisors in order to discredit her performance and that DSS made attempts to discipline her for alleged errors with her case worker assignments. Only after DSS had attempted to discipline her for minor errors on her case worker assignments was she ever offered a training opportunity that was routinely given to the other employees.

The trial court's finding that Ms. McNeil could not work independently and was inefficient were facts that were strongly denied and disputed. The evidence as forecasted by Ms. McNeil established that DSS created a paper trail of concocted and misleading representations about Ms. McNeil's work performance solely to impede her efforts to be promoted. Between August 1998 and November 1999, Ms. McNeil applied for the following promotions.

a. Income Maintenance Case Worker II in the Medicaid Unit (April 28, 1999)

b. Income Maintenance Case Worker II in the Food Stamp Unit (July 29, 1999)

c. Case Worker II in the Medicaid Unit (August 27, 1999)

d. Income Maintenance Case Worker II in the Medicaid Unit (11/8/99)

e. Income Maintenance Case Worker II in the Food Stamp Unit

Initially, DSS took the position that Ms. McNeil was simply not qualified for the positions that she applied. In his deposition, her supervisor testified that Ms. McNeil was not qualified for these positions. This testimony was contradicted by the DSS personnel official, Jan-Marie Fesmire, who testified that Ms. McNeil was in fact qualified for each position that she applied. She admitted that Ms. McNeil was qualified as an Income Maintenance Case Worker I working as an Income Maintenance Case Worker II.

Thereafter, DSS modified their contentions as to why Ms. McNeil was not considered for a promotion by claiming

that it was her lack of teamwork and poor efforts that made her an unsuitable applicant. DSS then sought to balance their "legitimate" reason for not fairly considering Ms. McNeil for each promotion by claiming that she was either not qualified or that she lacked the requisite interpersonal skills. These drastic changes by DSS in explaining the non-selections created the inference that their "legitimate" reasons for not selecting Ms. McNeil were pretextual.

The stress from the treatment from DSS caused Ms. McNeil to seek medical leave. She took a short leave period, but returned only to have her supervisors resume the harassment, by reassigning her new case worker duties. When the unreasonable scrutiny of her work continued, she became so severely depressed that she was forced to take an extended leave from DSS.

While on extended medical leave, Ms. McNeil was under the care of Ms. Rosalyn Harris-Offuit, CRNA, BS, LPPC, LNC, ADS. Once it was determined that Ms. McNeil was suffering from post-traumatic stress, it was recommended that she minimize her contact with DSS as part of her recovery. Ms. Atwannia Latonya McQueen, Ms. McNeil's daughter, agreed to serve as liaison between DSS and Ms. McNeil.

Near the end of the extended leave period; Ms. Harris-Offuit and Ms. McNeil agreed that she needed more time to recover. DSS extended the extended leave period by 30 days to October 31, 2000. On October 16, 2000, DSS advised Ms. McNeil that her extended leave was about to expire and that it was necessary for her to provide alternatives.

Ms. Harris-Offuit responded on behalf of Ms. McNeil two days later on October 18, 2000 requesting that Ms. McNeil's leave be extended to January 3, 2001. Ms.

Harris-Offuit submitted this request as she had submitted the previous requests as prescribed by DSS. DSS did not respond to Ms. Harris-Offuit, but instead notified Ms. McNeil on October 30, 2000 that she was being terminated.

REASONS FOR GRANTING THE PETITION

I. WHETHER A NON-MOVANT TITLE VII PLAINTIFF'S EVIDENCE OF PRETEXT SHOULD BE ANALYZED BY THE DISTRICT COURT BY MORE OBJECTIVE PERIMETERS AS TO WHEN A GENUINE ISSUE OF A MATERIAL FACT EXISTS?

Introduction

Petitioner (Ms. McNeil) is asking the Court to establish a more standard process for determining whether a "genuine issue of a material fact" exists as it relates to a non-movant plaintiff's evidence of pretext in a summary judgment. Summary judgment is proper if the movant demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P.56(c). In applying this standard, the court is required to view the factual record and draw all reasonable inferences most favorably to the nonmovant who in this case was the plaintiff. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Principles of Summary Judgment

Summary judgment may not be granted unless the submission of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. Summary judgment should be granted only where it is "perfectly clear that no issue of fact is

involved and inquiry into facts is not necessary to clarify application of the law." McKinney vs. Bd. Of Trustees of Maryland Community College, 95 F.2d 924, 928 (4th Cir. 1992).

In many ways, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) was a seminal case insofar as it recognized that an issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. It was further explained that an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. See Id. Accordingly, the substantive law[1] will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. To be "genuine," a dispute must involve evidence upon which a jury could find for the nonmoving party. Id. The burden is upon the moving party to show "that there is an absence of evidence to support the

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[1]Title VII is the primary substantive law involved in this case. To prove unlawful discrimination under the legal framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1877 (1973), the employee "must carry the initial burden... of establishing a prima facie case, by producing evidence adequate to create an inference that an employment decision was based on a(n) (illegal) discriminatory criterion," Teamsters vs. United States, 431 U.S. 324, 358 (1977). Once established, the burden shifted to Scotland County (DSS) to "rebut the presumption of discrimination by producing evidence that the discharge of Ms. McNeil was for a legitimate, nondiscriminatory reason." Texas Dept't of Community Affairs v. Burdine, 450 U.S.. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). Assuming DSS had in fact met their burden of production, the remaining question was whether Ms. McNeil forecasted sufficient evidence to create a genuine dispute about a material fact involving pretext. Mary's Honor Ctr. V. Hick, 509 U.S. 502, 506-11, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).

nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)

If the movant carries this initial burden, the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. at 324; Anderson v. Liberty Lobby, Inc., 477 U.S. at 248. To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein. See Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir.), cert. denied, 506 U.S. 1013, 121 L. Ed. 2d 566, 113 S. Ct. 635 (1992).

Legal Analysis

Ms. McNeil established by her evidence a prima facie case of non-selection under Title VII, but the District Court found that Ms. McNeil did not establish sufficient evidence of pretext to overcome DSS's "legitimate non-discriminatory" reasons for her treatment. This finding by the court was made despite Ms. McNeil's evidence showing that DSS had retreated from these initial claims that Ms. McNeil was not qualified for these positions and later based the non-selections on her alleged conduct and work performance.

As an initial matter, it should be made clear that Ms. McNeil is not contending that the decision by DSS not to give her a position description was a Title VII violation. Nor was Ms. McNeil contending that the decision by DSS to assign her duties on a daily basis was a *per se* violation of Title VII. The conduct of DSS that Ms. McNeil is contending was a Title VII violation was the misrepresentation by DSS

that her duties were being assigned to her on a daily basis because she was inefficient in performing her work when in fact she was being assigned these case worker duties because she did not have a permanent work schedule.

The pretext evidence clearly showed that as a Clerk Assistant III, Ms. McNeil was routinely assigned case worker assignments which were outside the realm of what she had originally been hired to perform. Furthermore, her case worker assignments were subjected to an inordinate amount of scrutiny after each selection and she was disciplined for three minor errors in her case worker duties although she was never given any training to be a case worker. Despite the repeated assertions after each non-selection by DSS that Ms. McNeil's inefficient work performance was the reason why she was not promoted to a case worker, DSS continued to assign Ms. McNeil case worker assignments. A reasonable jury could have inferred that DSS's reasons for not selecting Ms. McNeil were pretextual in light of the fact that DSS appeared to have a problem with her case worker duties only when she was applying for a promotion into a case worker postion.

DSS also claimed that Ms. McNeil was discharged after she failed to respond to their October 16, 2000 request that she provide alternatives to her extended sick leave. In fact, Ms. McNeil responded through her health care provider on October 18, 2000 with a request that DSS notify her immediately if they had a concern about her proposed alternative to the extended leave. DSS terminated Ms. McNeil on the basis that she did not respond. In light of the uncontradicted evidence that Ms. McNeil did respond, a reasonable jury should have been allowed to consider the pretextual nature of the reasons given by DSS for terminating her.

The essence of Ms. McNeil's evidence of pretext was that she was a victim of retaliatory harassment by the actions of DSS in unreasonably scrutinizing her work in an effort to concoct false justifications not to select her for these positions. This evidence revealed a pattern whereby immediately before and/or after she applied for each promotion, uncorroborated allegations by her supervisors surfaced about her work performance or conduct that were used to support her non-selection. The record supports instances of intense scrutiny upon her work, the withholding of training and duties, the refusal to permit her to receive proper training, the threats of discipline as well as the actual imposition of reprimands and other disciplinary actions against her which were all sufficient forms of harassing behavior of a continuous nature by DSS to adversely effect the "terms, conditions, or benefits of (her) employment." That this same evidence supported her hostile working environment claim did not preclude it from also serving as evidence of pretext. A reasonable jury could have inferred that these tactics of retaliatory harassment were tailored by DSS to stifle her attempts to be promoted.

The primary focus of the substantive law as outlined in McDonnell Douglas was to provide Ms. McNeil with an opportunity to produce evidence of a prima facie case of discrimination through indirect evidence which established an inference of discrimination. However, the district court impermissibly altered the recognized burden of proof standard by adopting DSS's version of critical factual determinations that were clearly disputed issues of fact such as that Ms. McNeil could not work independently and was inefficient, that she was not qualified for the positions or that the quality of her work and interpersonal skills were lacking. The manner in which the District Court credited the justifications offered by DSS while discounting the evidence of pretext presented by Ms. McNeil represented an improper credibility determination and a clear

measurement of the evidence which was contrary to the principles of summary judgment.

The premise of her pretext evidence was that she was unjustly accused of misconduct or poor performance by DSS each time she applied for a promotion. The evidence was equally clear that while Ms. McNeil was required to perform the duties of a case worker, she was deemed not qualified to be promoted into a case worker position on each occasion that she applied. The record also showed that the work performance issues raised by DSS each time she applied for a position were associated with the same case worker duties that Ms. McNeil was required to perform without adequate training that was afforded to others. A reasonable factfinder could have inferred pretext from the simple fact that DSS continued to assign Ms. McNeil case worker duties to perform under threat of discipline even after they continued to deny her any case worker promotions.

The District Court relied upon Hawkins v. Pepsico, Inc,. 203 F.2d 274, 280 (4th Cir. 2000) in ruling that Ms. McNeil failed to produce "evidence that shows (DSS's) assessment of her performance was dishonest or... not the real reason for her termination-- as the law requires...." Id. The Court's conclusion that Ms. McNeil simply disputed the merits of DSS's evaluation missed the focus of her evidence of pretext. Ms. McNeil's efforts to rebut the claims by DSS that her work performance was poor was miscategorized by the District Court as opinion evidence regarding her beliefs about the quality of her work as compared to the weight the Court gave DSS as to their opinion about the quality of her work. In a case where a material issue is whether the quality of the plaintiff's work was the "non-discriminatory reason" for her non-selection, the District Court should not have disregarded Ms. McNeil's rebuttal evidence (by her and her witnesses) that she was performing her duties well

and that she was being harassed by the manner in which her work was evaluated by DSS.

The record exposed the glaring contradiction that DSS made when they claimed that Ms. McNeil was not qualified to receive a case worker promotion even though she was still required to perform these same duties. A reasonable jury could easily have inferred that DSS's willingness to continue to assign Ms. McNeil caseworker assignments after each occasion that she was turned down for a case worker promotion was sufficient evidence of pretext. This uncontradicted evidence involved material factual circumstances that supported the very foundation of Ms. McNeil's evidence of pretext and as such, should have been resolved by the fact finder and not the District Court.

Although DSS failed to meet its burden under Rule 56 to rebut the evidence of pretext, Rule 56 does not provide a recognized process that would have been instructional to the District court as to how Ms. McNeil's evidence of pretext should have been evaluated. An issue is "genuine" if the evidence presented is such that a reasonable jury could resolve the issue in favor of the nonmoving party and a "material" fact is one that might affect the outcome of the suit under governing law. Fajardo Shopping Ctr. V. Sunn Alliance Ins. Co., 167 F.3d 1, 7 (1st Cir. 1999). Put another way, a "genuine" issue is one "that properly can be resolved only by a finder of fact because (it) may reasonably be resolved in favor of either party. Anderson v. Liberty Lobby, 477 U.S. at 250 and a "material" issue is one that "affects the outcome" of the suit to aver the lack of a genuine, material factual issue. Id at 248. The burden is upon the moving party to aver the lack of a genuine, material factual issue as to the evidence of pretext presented by Ms. McNeil. Finn v. Consolidated Rail Corp., 782 F. 2d 13, 15 (1st Cir 1986).

Proof that DSS's explanations were unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt. Wright v. West, 505 U.S. 277, 296, 120 L. 3d 2d 225, 112 S. Ct. 2482 (1982).

Moreover, once DSS's justification had been eliminated, discrimination was the most likely alternative explanation, especially since DSS was in the best position to put forth the actual reason for its decision. Furnco Constr. Corp. V. Waters, 438 U.S. 567, 577, 57 L.Ed. 2d 957, 98 S. Ct. 2943. (When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons of the employer's actions, it is more likely that not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration").

There exists strong precedent that a defendant's motives, intentions and/or knowledge can be very relevant evidence that might be helpful to the factfinder.[2]

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[2] The general principles against exclusions of relevant evidence were outlined in Estes v. Dick Smith Ford, Inc., 856 F. 2d 1097, 1103 (8th Cir. 1988) which stated that:

The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which a plaintiff must face the difficult task of persuading the fact-finder to disbelieved an employer's account of its own motive.... Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices- evidence which in other kinds of cases may unfairly prejudice the jury against the defendant.

Furthermore, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive. As the Fourth Circuit noted in Warren v. Halstead Indus., Inc., 802 F.2d 746 (4th Cir.1986):

> Evidence of a general atmosphere of discrimination may also be considered: proof of historically limiting opportunity or harassment. Even where such past discriminatory acts are time barred for purposes of a particular claim, the Supreme Court has stated that this type of a showing "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." ... In addition, evidence of a general atmosphere of discrimination may be considered with other evidence bearing on motive in deciding whether a plaintiff has met his burden of showing that the defendant's articulated reasons are pretextual... Thus, evidence of racial harassment or threats, though not the subject of a distinct claim, is relevant to the determinations of intent and pretext. Id. at 753.

The evidence involving why Ms. McNeil did not have a permanent position, the fact that she was assigned duties at the pleasure of management, the fact that she performed case worker duties while employed as a clerk and the fact that DSS misrepresented why she was given duties on a daily basis was introduced to show both the state of mind and motive of DSS. Where a plaintiff seeks to prove discriminatory state of mind or intent, the probative value of conduct and/or statements revealing the retaliatory attitudes of the decisionmaker is great. This is so because of the inherent difficulty of proving state of mind. As the Supreme Court has noted, "there will seldom be 'eyewitness' testimony as to the employer's mental processes." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983).

The evidence as forecasted by Ms. McNeil supported a clear inference that after each promotion attempt, uncorroborated allegations by DSS would surface about her work performance or conduct. Ms. McNeil's pretext evidence demonstrated first that DSS originally claimed she was not qualified for the positions. When she rebutted that contention, DSS then modified their reasons by misrepresenting that her duties had to be assigned to her on a daily basis because she was inefficient when the evidence clearly showed their refusal to provide her with a position description was the reasons she was assigned duties on a daily basis and that they continued to assign her caseworker assignments despite passing her over for these promotions.

When an employee provides sufficient evidence for the fact finder to reject the nondiscriminatory explanation offered by the employer, not only may the fact finder continue to infer discrimination from the prima facie evidence, but the fact finder now has additional evidence from which it may reasonably infer discrimination. "As a matter of both common sense and federal law, an employer's discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988).

This evidence offered by Ms. McNeil was clearly "material" under the pretext analysis of Title VII and directly contradicted the non-discriminatory reasons articulated by DSS in such a manner as to satisfy the "genuine dispute" aspects of Rule 56. However, this evidence of pretext was simply not adequately considered by the District Court in its order granting summary judgment for DSS. While Title VII law sufficiently defines the nature of what is pretext evidence, there does not appears to be a standard or consistent practice as to how

evidence of pretext which is introduced by the nonmoving party should be considered by a court in ruling on a summary judgment motion.

While a court cannot weigh the evidence during summary judgment, there does not appear to be a standard measurement that would be suitable to assist reviewing courts from either ignoring or perhaps simply not adequately considering pretext evidence offered by the nonmovant. The phrasing by the court that "a reasonable jury could not have returned a verdict in favor of the non-moving party" presupposes that not only has some type of weighing of the evidence has at least informally occurred, but that a credibility determination has already been made not only about the non-movant's evidence, but of a prospective jury's competence to hear this evidence.

The evidence forecasted by Ms. McNeil was sufficient to raise a question of fact as to whether the purported reasons for her non-selection were retaliation that resulted from her protected activities. DSS's refusal to give Ms. McNeil a permanent job schedule while suggesting that she was inefficient in her work performance was clear evidence of that they were concocting reasons to discredit her performance and should have been given to a jury for resolution. While it is clearly not illegal for an employer to withhold a permanent position description from an employee, efforts by that employer to misrepresent daily tasks being issued to an employee (not assigned a permanent position description) under the pretense that this employee did not manage her work efficiently was engaged in misconduct, but whether that belief was genuine or pretextual." Id. at 1080.

The evidence forecasted by Ms. McNeil proved that DSS could not have possibility believed their allegations. There is no evidence that Ms. McNeil refused to perform her

work although she was never given a job description. Furthermore, there is no evidence that she did not attempt to perform the assignments given to her even though she was denied the training that was afforded to her co-workers. And yet, DSS continuously disciplined Ms. McNeil for deficiencies with her case worker duties while denying her proper training to perform these tasks.

The District Court assigned more weight to DSS's assessment as to the quality of Ms. McNeill's work performance over that of Ms. McNeil or her co-workers was misplaced. The court did not consider that this evidence went beyond simply confirming the type and quality of her work. This evidence as forecasted by Ms. McNeil was introduce to corroborate the harassment and hostility in the working environment that Ms. McNeil was experiencing. The perceptions by these witnesses as to the harassing treatment Ms. McNeil was subjected and the type and quality of work she performed as a casework was credible evidence that should not have been disregarded.

It has become increasingly difficult for African American plaintiffs to pursue race and retaliation claims at the trial and appellant levels which stems from a subtle form of judicial hostility towards discrimination claims. There is in existence a general misconception that employment cases are easy-not difficult-to win, and the volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits. See in general, Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win, 61 La. L. Rev 555 (2001) (Courts appear hesitant to draw inferences of discrimination based on circumstantial evidence, even though courts have long recognized that discrimination is generally subtle in form and dependent on circumstantial evidence).

Ms. McNeil's evidence proved that her working environment was so polluted with retaliation and harassment, that she was significantly impeded from performing her job or seeking promotions. The law is clear that Ms. McNeil was entitled "to have the credibility of (her) evidence as forecasted assumed, (her) version of all that is in dispute accepted, [and] all internal conflicts resolved favorably to (her)." Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990). While the District Court was not required to weigh the evidence nor try to determine the truth of the matter, Anderson v. Liberty Lobby, Inc. 447 US. at 249, it was error for the District Court to consider Ms. McNeil's evidence of harassment that impeded her ability to be promoted as simply her "opinion" about the quality of her work.

The basic principles in the holding in Reeves was that a prima facie case of discrimination, combined with sufficient evidence for a trier of fact to believe the defendant's legitimate, nondiscriminatory reason for its decision, was sufficient as a matter of law to show intentional discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 130, 120 S.Ct. 2097, 68 U.S.L.W. 4480., 82 Fair. Empl. Prac. Cas (BNA 1748. (June 12, 2000). The District Court did not give fair consideration to the evidence showing Ms. McNeil was never given fair opportunities for any promotions because of her protected activities and that the subjective factors that the defendants claim they relied upon were concocted in order to impede her ability to compete for these promotions. Her evidence of a hostile environment which came in the form of how she was mistreated after she filed her EEOC charges and her subsequent termination created a material issues of fact and should not have been dismissed as simply her opinion about the quality of her work environment. With each inference being drawn against Ms. McNeil by the District Court

adopting the contentions of DSS, it was virtually impossible for her to prove her pretext evidence.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit and ultimately, to vacate and reverse and remand this case to the District Court for trial.

This the 14th day of April 2003.

James H. Locus, Jr.
Counsel of Record
Attorney for Petitioner Lenora McNeil
P.O. Box 331
Fayetteville, NC 28302
(910) 630-1491
BAR #: 13852